SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 545

LOCKE MILLER,

Petitioner,

vs.

MICHAEL J. KIRWAN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT.

H. H. Hoppe,
Counsel for Respondent.

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Opinion Below.

The court below rendered no opinion. The entry of the court under date of September 20, 1940, is set forth in the record, pages 292 and 293.

Jurisdiction

The judgment of the Supreme Court of Ohio was rendered on September 20, 1940. (R. 292 and 293) An application for rehearing filed October 3, 1940 (R. 289-d) was denied

October 9, 1940. (R. 292 and 293) The petition for writ of certiorari was filed November 2, 1940.

Jurisdiction of this Court is claimed by petitioner under favor of Section 237(b) of the Act of February 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344 (*infra* p. 8).

Respondent denies the jurisdiction of this Court because:

(a) No Federal question was necessary to the determination of this cause in the Supreme Court of Ohio; *Honeyman* v. *Hanan,* (1937), 300 U. S. 14.

(b) No substantial Federal question was presented to the Supreme Court of Ohio and none is here presented. *Patterson* v. *Stanolind Oil & Gas Co.,* 305 U. S. 376.

Question Presented.

Did the court below, in denying petitioner the right to take and file additional depositions, deny him that due process of law and equal protection of the law guaranteed him by the Fourteenth Amendment?

Statutes Involved.

The Pertinent statutes will be found in the Appendix, *infra,* pp. 9 to 10.

Statement of Fact.

This was an original action filed in the Supreme Court of Ohio on June 7, 1940, under favor of Section 4785-166 of the General Code of Ohio (*infra,* p. 9). Petitioner sought to contest the Democratic nomination of respondent *at the May 14, 1940, primary election* for the office of United States Congressman for the 19th District of Ohio, on the ground that respondent had acquired such nomination by resort to corrupt practices. The petition filed below made specific charges of alleged corrupt practices claimed to have been resorted to during the course of respondent's success-

ful campaign for re-election at the *general election held in November, 1938*, but made no direct charges of corrupt practices resorted to during the course of the campaign *for renomination at the May 14, 1940, primary.* (See Petition, R. 1-9) No court has jurisdiction to hear and determine a contest *of the general election held in November, 1938,* for the reason that under the Constitution each house of Congress is the sole judge of the election and qualification of its own members. (See Article I, Section 5, *infra,* p. 8. *Smith* v. *Polk,* (1939) 135 O. S. 70.)

On June 27 and July 1, 1940, (R. 290), petitioner filed below in deposition form his evidence in support of the charges made in his petition. (See G. C. 4785-173, *infra,* p. 10.) On July 15, 1940, respondent filed his exceptions thereto and motion to strike (R. 291) upon the grounds that the testimony offered (1) dealt with the 1938 general election, (2) did not show any corrupt practice resorted to in the course of the May, 1940, primary, and (3) was purely hearsay.

On July 31, 1940 (R. 291) petitioner filed his brief on the merits below and on August 14, 1940, respondent filed his brief. (R. 291)

Thereafter on August 19, 1940, petitioner filed below his motion for leave to take and file additional depositions, (G. C. 4785-173, *infra,* p. 10), claiming to have discovered new witnesses who could testify as to material facts not known to petitioner when depositions were originally taken. (R. 268 and 291) The character of the new evidence claimed to have been discovered was not set forth in the motion. On August 26, 1940, petitioner's motion was denied and the cause set for hearing on its merits on August 30, 1940. (R. 292)

On August 28, 1940, petitioner filed below his motion for rehearing of his application for leave to take and file additional depositions, supported by affidavit, (R. 271 and

273), and this application for rehearing was heard on August 30th, followed by a hearing on the merits of the case. At the conclusion of both such hearings petitioner was, at his request, granted five days within which to file an affidavit, setting forth the character of the additional testimony he desired to offer, (Stipulation re printing of the record, p. 3, R. 297 and 297-a), and his affidavit in this respect was filed on September 4, 1940. (R. 278 to 287)

On September 9, 1940, respondent filed below a memorandum resisting petitioner's appplication for rehearing on his motion to take and file additional depositions, supported by the affidavits of the witnesses named in petitioner's affidavit of September 4th, to the effect that they could not testify as petitioner claimed they would in petitioner's affidavit of September 4th. (R. 287-a to 287-w)

On September 9, 1940, petitioner filed below another affidavit with respect to a matter entirely foreign to the issue at hand. (R. 288 and 292-293. See court entry of September 20, 1940.)

On September 12th respondent filed below a letter from one of the witnesses mentioned in petitioner's affidavit of September 4th. (R. 289-c)

On September 11th petitioner filed below a memorandum replying to the memorandum and affidavits filed by respondent on September 9th. (R. 289-a)

All of the foregoing applications, affidavits and memoranda were taken under advisement by the court. On September 20, 1940, the court below

(a) denied petitioner's application for rehearing of motion for leave to take and file additional depositions, (R. 292);

(b) dismissed petitioner's affidavit (R. 292 and 293) filed September 9th as having no bearing on the issues presented, (R. 292 and 293);

(c) denied the prayer of and dismissed petitioner's petition filed below on the ground that no evidence had been adduced showing that respondent had resorted to any corcupt practice in obtaining the Democratic nomination at the May 14, 1940, primary, (R. 293); and, in view of the foregoing

(d) found it unnecessary to pass upon respondent's exceptions to and motion to strike petitioner's depositions which had been filed. (R. 293)

Argument.

Petitioner's right to file the action below is one granted by statute. (G. C. 4785-166-167, *infra*, p. 9-10.) The same statute likewise required petitioner to file his evidence in deposition form within twenty days after filing suit unless "further time be allowed by the court." (G. C. 4785-173, *infra*, p. 10.) Suit was filed June 7, 1940. (R. 290) It is thus obvious that leave of court had to be obtained to take and file depositions after June 27, 1940. It is equally clear that the court would grant such leave only upon a showing that the additional evidence sought to be offered was material and could not have been adduced within the time fixed by statute.

When petitioner on August 19th first asked for leave, he made no showing whatsoever that the evidence sought to be produced was material or that it could not have been produced by June 27th. (R. 268) On his application for rehearing filed August 28th (R. 271) and orally heard by the court on August 30th, (See stipulation re printing of record, p. 3, R. 297 and 297-a) petitioner again failed to show that the alleged newly discovered evidence would support any charge of corrupt practice resorted to in the course of the May 1940 primary campaign. His alleged newly discovered evidence was pure hearsay and dealt en-

tirely with alleged corrupt practices resorted to in the course of the campaign for reelection at the November 1938 general election. Nevertheless, on August 30th the court below granted petitioner (See Stipulation re printing of record p. 3, R. 297 and 297-a) the right to file an additional affidavit with respect to the testimony he desired to offer and this affidavit was filed September 4, 1940. (R. 278 to 287)

In this affidavit of September 4, 1940, petitioner set forth the names of the witnesses whose testimony he desired to offer by additional depositions. He likewise set forth what he hoped to prove by each witness. Respondent thereupon obtained the affidavit and statement of each of the witnesses mentioned in petitioner's affidavit, which affidavits and statements are all to the effect that not one of them could testify to the effect set forth in petitioner's affidavit, and further that not one of them participated in any manner in the campaign preceding the May 1940 primary. These affidavits, affixed to a memorandum of respondent, were filed in the Supreme Court of Ohio on September 9, 1940. (R. 287-a, 287-1, 287-n, 287-q, 287-t.) On September 11, 1940, (R. 289-a) petitioner's only answer to these affidavits was that under the statute, Section 4785-173, *infra* p. 10), the cause was to be heard upon depositions and not upon affidavits, an answer which begged the question. The affidavits were not filed as evidence upon the merits of the case but as answer to his own affidavit filed in support of his application for a rehearing on his motion to take and file additional depositions and to show that petitioner was indulging in a lot of wishful thinking and could not offer by way of additional deposition the evidence which he claimed he could offer.

Thus the record of the proceedings had in the Supreme Court of Ohio shows that petitioner was granted ample

opportunity to be heard, was heard and was not denied due process of law or the equal protection of the laws.

It is thus also apparent from the record below that no Federal question was necessary for a determination of the cause and that no substantial Federal question was presented to the court below. *Honeyman* v. *Hanan,* (1937) 300 U. S. 14; *Patterson* v. *Stanolind Oil & Gas Co.,* 305 U. S. 376.

We therefore respectfully submit that this Court has no jurisdiction to review the judgment of the court below upon writ of certiorari. Further, if such jurisdiction does exist, the record of the proceedings below shows that no error was committed and that petitioner was granted ample opportunity to be heard and was heard and was not denied either the due process of law or the equal protection of the laws guaranteed him by the Fourteenth Amendment to the Constitution.

Respectfully submitted,

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APPENDIX

APPENDIX.

Federal Constitution

Article I, Section 5: "Each house shall be the judge of the elections, returns, and qualifications of its own members. * * *"

Federal Statutes

28 U. S. C. A. 344: "(Judicial Code, section 237, amended.) *Appellate jurisdiction of decrees of State courts; certiorari.* (a) * * *

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"(c) * * *"

State Statutes

"§ 4785-166. *Contest of election.* The nomination or election of any person to any public office or party position, or the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state, county or political subdivision, as the case may be, upon the terms and conditions as hereinafter provided. a. In the case of an office to be filled, or an issue to be determined, by the voters of the entire state, or for the offices of members of the congress of the United States, or for judicial offices higher than that of court of common pleas, or for an office to be filled, or an issue to be determined, by the voters of a district larger than a county, said contest shall be heard and determined by the chief justice, or a justice of the supreme court assigned for that purpose by the chief justice; except that in a contest for the office of chief justice of the supreme court, such contest shall be heard by a justice of such court designated by the governor. b. In the case of all other offices or issues, except judicial offices, such contests shall be heard and determined by a judge of the court of common pleas of the county in which the contest arose. In the case of a contest for a judicial office within a county such contest shall be heard by the court of appeals of the district in which such county is located. If any contestant shall allege prejudice on the part of the judges of the court of appeals or common pleas, assigned by law to hear such appeal, then the chief justice of the supreme court, upon application of any such contestants and for good cause shown, may assign a judge or judges from another court to hear such contest."

"§ 4785-167. *Filing contest petition.* Such a contest shall be commenced by the filing of a petition therefor with the clerk of the appropriate court signed by at least twenty-five voters who voted at the last election for or against a candidate for the office or for or against the issue being contested, or by the defeated candidate

for said nomination or election, within fifteen days after the results of any such nomination or election have been ascertained and announced by the proper authority; or if there be a recount within ten days after the results of the recount of such nomination or election have been ascertained and announced by the proper authority. Such petition shall be verified by the oath of at least two such petitioners, or by the oath of the defeated candidate filing the same, as the case may be, and shall set forth the grounds for such contest. Said petition shall be accompanied by a bond with surety to be approved by the clerk of the appropriate court in a sum sufficient, as determined by him, to pay all the costs of the contest. The contestor and the person whose right to the nomination or election to such office is being contested, to be known as the contestee, shall be liable to the officers and witnesses for the costs made by them respectively; but if the results of the nomination or election be confirmed or the petition be dismissed, or the prosecution fail, judgment shall be rendered against the contestor for the costs; and if the judgment be against the contestee or if the results of the nomination or election be set aside then the county shall pay the costs as other election expenses are paid."

"§ 4785-173. *Testimony; supreme court.* In contests of election in the supreme court, all testimony shall be in the form of depositions. The contestor shall take and file his testimony within twenty days from the date of filing the petition, unless further time be allowed by the court or judge hearing the contest. The contestee, or the committee defending the issue, shall file his or its testimony within twenty days from the expiration of the contestor's time, unless such court or judge shall allow further time. The court may render such judgments and make such orders as the law and facts shall warrant, including judgment of ouster and induction, and the judgment of the supreme court shall be decisive of the contest."